UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/1994/25
17 November 1993

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fiftieth session
Item 10 (d) of the provisional agenda

# QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

## Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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GE.93-85655 (E)

CONTENTS


| | Paragraphs | Page |
|---|---|---|
| Introduction | 1 - 5 | 3 |
| I. ORGANIZATION OF THE SESSION | 6 - 20 | 3 |
| A. Election of officers | 6 | 3 |
| B. Attendance | 7 - 13 | 3 |
| C. Documentation | 14 | 4 |
| D. Organization of work | 15 - 20 | 5 |
| II. CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES | 21 - 80 | 6 |
| III. FUTURE WORK | 81 | 16 |
| IV. ADOPTION OF THE REPORT | 82 | 16 |
| Annex: Text of the articles which constitute the outcome of the beginning of the first reading | | 17 |

## Introduction

1. The Commission on Human Rights, at its forty-eighth session decided, in its resolution 1992/43 of 3 March 1992, to establish an open-ended inter-sessional working group to elaborate a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, using as a basis for its discussions the draft text proposed by the Government of Costa Rica (see E/CN.4/1991/66), and to consider the implications of its adoption and the relationship between the draft optional protocol, regional instruments and the Committee against Torture.

2. The Economic and Social Council, in its resolution 1992/6 of 20 July 1992, authorized an open-ended working group to meet for a period of two weeks prior to the forty-ninth session of the Commission on Human Rights.

3. In compliance with the above-mentioned resolutions, the working group, at its first session, held 16 meetings, from 19 to 30 October 1992.

4. Having considered the first report submitted by the working group (E/CN.4/1993/28 and Corr.1), the Commission on Human Rights, at its forty-ninth session, adopted resolution 1993/34 of 5 March 1993, in which it welcomed the substantial progress made by the working group at its first session, which enabled an exhaustive analysis to be made of the essential basic principles of the draft. The Commission also requested the open-ended working group to meet between sessions for a period of two weeks prior to the fiftieth session of the Commission in order to continue its work and submit a report to the Commission.

5. Consequently, the working group held its second session from 25 October to 5 November 1993. It was opened by the Assistant Secretary-General for Human Rights, Mr. Ibrahima Fall, who made an introductory statement. The adoption of the present report will take place at a reconvened meeting in February 1994.

## I. ORGANIZATION OF THE SESSION

### A. Election of officers

6. At its first meeting, on 25 October 1993, the working group elected H.E. Mr. Jorge Rhenán Segura (Costa Rica) as Chairman-Rapporteur.

### B. Attendance

7. The representatives of the following States, members of the Commission on Human Rights, attended the meetings of the working group, which were open to all members of the Commission: Argentina, Australia, Austria, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czech Republic, Finland, France, Germany, India, Japan, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Peru, Poland, Portugal, Republic of Korea, Russian Federation, Sudan, Syrian Arab Republic, Tunisia, United Kingdom of Great Britain and Northern Ireland, Uruguay, United States of America and Venezuela.

8. The following States non-members of the Commission on Human Rights were represented by observers at the meetings of the working Group: Algeria, Cameroon, Denmark, Egypt, El Salvador, Ethiopia, Greece, Guatemala, Honduras, Italy, Kuwait, Morocco, New Zealand, Nicaragua, Norway, Senegal, Slovakia, Sweden and Turkey.

9. Switzerland, which is not a member of the United Nations, was represented by an observer.

10. The United Nations Educational, Scientific and Cultural Organization was represented by an observer.

11. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers at the meetings of the working group: Amnesty International, International Commission of Jurists and International Service for Human Rights.

12. Upon the decision of the working group, the Association for the Prevention of Torture and the Rehabilitation and Research Centre for Torture Victims, which do not have consultative status with the Economic and Social Council, were also represented by observers.

13. The International Committee of the Red Cross was represented by an observer.

## C. Documentation

14. The working group had before it the following documents:

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| E/CN.4/1993/WG.11/L.1 | Provisional agenda |
| E/CN.4/1993/WG.11/WP.1 | Working paper submitted by the Secretariat pursuant to Commission on Human Rights resolution 1992/43 |
| E/CN.4/1993/WG.11/WP.1/Add.1 | Comments and proposals submitted by Egypt, Zimbabwe, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child |
| E/CN.4/1991/66 | Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights |
| E/CN.4/Sub.2/1991/26 | Consolidated list of the Secretary-General of provisions in the various United Nations standards relating to human rights in the administration of justice |

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: text of the Convention and explanatory note by the Council of Europe

Inter-American Convention to Prevent and Punish Torture.

## D. Organization of work

15. At its 1st meeting, on 25 October 1993, the working group adopted its agenda contained in document E/CN.4/1993/WG.11/L.1.

16. The Chairman-Rapporteur made an opening statement, referring to the work carried out to date by the Government of Costa Rica, the group of independent experts, the Commission on Human Rights and the working group itself at its first session. He paid particular tribute to Mrs. Elizabeth Odio Benito, under whose chairmanship the group achieved useful progress in the context of the initial consideration of the draft optional protocol. He recalled that the draft submitted by the Government of Costa Rica should constitute the basis and frame of reference for the group's deliberations. He also suggested that the working group's report (E/CN.4/1993/28), together with the comments and suggestions that were made by Governments, specialized agencies, supervisory bodies and non-governmental organizations (E/CN.4/1993/WG.11/WP.1 and Add.1), should provide the basis for decisions to be taken on revisions or amendments to the draft optional protocol at the present session. He invited the group to continue its work and submit its report to the Commission, in accordance with resolution 1993/34.

17. The working group established an informal open-ended drafting group chaired by Mr. Zdzislav Kedzia, the representative of Poland, to work out proposals on the concrete wording of the articles considered and revised by the working group. Accordingly, the working group decided to work its way, article by article, through the draft submitted by Costa Rica and its first report, modifying and/or replacing particular provisions in the Costa Rican text as necessary.

18. It was also agreed that when the whole text had been covered in this way, further consideration would have to be given to the title of the draft optional protocol as well as its preamble. More generally, it was agreed to consider the articles thematically in order to organize their elaboration.

19. It was also decided that, when the working group had completed its first reading of the draft in its entirety, a second reading of the text would be undertaken with a view to its final adoption by the working group.

20. The working group had the advantage of hearing a number of significant presentations on the issues before it. A detailed statement was made by the head of the Division on Detention of the International Committee of the Red Cross (ICRC), Mr. Angelo Gnaedinger, who described the organization's experience in conducting and financing visits in the various circumstances that fall within its competence. The observer for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Mr. Love Kellberg, described the work of the Committee and his practical experience in carrying out visits to States parties to the European Convention. The representative of the Committee against Torture, Mr. Bent Sorensen, attended the working group and reviewed the practice and the views of the Committee. The Special Rapporteur on the question of torture of the Commission on Human Rights, Mr. Nigel Rodley, also made a presentation on issues related to his mandate. Mr Pedro Nikken, independent expert of the Commission on Human Rights on human rights in El Salvador, described the

practice of human rights monitoring in the field under the inter-American human rights system and the interrelationship between the universal and regional systems.

## II. CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES

21. In the light of the above-mentioned decisions on its working methods, the working group embarked on its examination and revision of the draft submitted by Costa Rica (E/CN.4/1991/66) and supplemented it by comments and suggestions of Governments, specialized agencies, treaty bodies and non-governmental organizations contained in E/CN.4/1993/WG.11/WP.1 and Add.1. The text of articles 1 to 7, as contained in the annex, constitute the outcome of the beginning of the first reading of the optional protocol during the second session of the working group.

### Article 1

22. At its 1st, 2nd, 7th and 17th meetings, on 25 and 28 October and 4 November 1993, the working group considered article 1. In paragraph 1, it was agreed to replace the words "agrees to" by the word "shall" and "within its territory" by "in any territory under its jurisdiction". One delegation suggested to replace the words "within its jurisdiction" by the words "under its direct or indirect control". In its opinion, such a formulation would cover situations of constraint in cases of civil war and would furthermore eliminate uncertainties in some federal States. One delegation proposed to add at the end of this paragraph the following words: "provided that full respect is assured for the principles of non-intervention and the sovereignty of States".

23. Several delegations supported that proposal. Others pointed out that the principles contained in the proposed text were embodied in the Charter of the United Nations. In their opinion, the proposed additional reference would diminish the clarity of the central obligation of the protocol, which was to permit preventive visits. It was decided to put the proposed phrase in square brackets. Some delegations stated that agreement of the State concerned should be required prior to each visit by the envisaged body. One delegation noted that this issue was dealt with in article 12 of the draft and should be considered at a later stage.

24. With respect to paragraph 2 of article 1, it was suggested that it should state the prevention of torture as a clear objective. One delegation therefore proposed to insert before the word "torture" the following words: "and to take measures for the prevention of". This suggestion was supported by some delegations. However, one delegation felt that the insertion was not necessary because all provisions of the draft optional protocol were aimed at the prevention of torture and thus all of them had a preventive character. It was decided to put the words proposed for insertion in square brackets. One delegation felt that the words "of persons deprived of their liberty" should be replaced by the words "persons considered to be subjected to torture".

25. A number of participants felt that the broad reference to unspecified "international standards" as the basis for the subcommittee's visits was not sufficiently clear and could give rise to difficulty to State administrations

which might not be aware of international norms and standards. In that regard, one delegation proposed, and the group agreed, to insert before the word "international" the word "applicable".

26. Many delegations considered, however, that "applicable international standards" meant only those existing instruments relating to torture as might be relevant; they therefore suggested the deletion of the words "in accordance with applicable international standards". It was also considered that non-binding standards should not be imposed in international legally binding instruments. Others considered that it was necessary to retain a reference to "applicable international standards" as they constituted an important framework and source of reference for both the Subcommittee and States parties. Some participants proposed to replace the word "standards" by the word "instruments". It was finally proposed and agreed to retain the word "standards" and to add the words "instruments" and "law", and to put all three words in square brackets.

Article 2

27. The working group considered article 2 at its 2nd, 3rd, 7th and 17th meetings, on 25, 26 and 28 October and 4 November 1993. The group agreed to replace the opening words, "The Committee against Torture shall establish", by the words "There shall be established", based upon the consideration that, where possible and appropriate, the text of the draft optional protocol should follow that of the Convention against Torture. The present wording follows that of article 17, paragraph 1, of the Convention.

28. There was a prevailing opinion that the body to be established under the optional protocol should be a separate body from the Committee against Torture. Moreover, some delegations noted that only States parties to the optional protocol, not the Committee against Torture, could establish a subcommittee as a treaty body. It was felt by most delegates that the differences in the objectives of both treaty monitoring bodies justified such a separation. In that regard, a number of delegates referred, inter alia, to the quasi-jurisdictional functions of the Committee against Torture, such as the consideration of communications from States parties and individuals. The primary objective of the optional protocol, however, was considered to be to promote the taking of preventive, as opposed to jurisdictional, measures against torture. It was assumed that the confidentiality required by the preventive mechanism would impair the impartiality required by the jurisdictional function of the Committee against Torture.

29. While agreeing to the appropriateness of establishing a separate monitoring body under the optional protocol, most delegates at the same time were in favour of establishing an institutional link between the envisaged body and the Committee against Torture. Such a link should both safeguard consistency with the protective system already established under the Convention against Torture and clarify the subordinate status of the body to be established by the optional protocol vis-à-vis the Committee against Torture. To that end, a number of delegations favoured inserting after the word "Punishment" the words "of the Committee against Torture". In addition, one delegation suggested to insert thereafter the words "which shall carry out the functions laid down in the present protocol".

30. Some delegations regarded the establishment of a separate body (be it a subcommittee or otherwise) as excessive, for reasons of both co-ordination and cost. An extension of the mandate of the Committee against Torture would seem more appropriate to those delegations, as they believed that the purpose and functions of the preventive system to be established could also be fulfilled by the Committee against Torture.

Article 3

31. At its 2nd, 7th and 17th meetings on 25 and 28 October and 4 November 1993, article 3 was considered by the working group. While the desirability of a short statement of principles embodied in the article was reiterated, there were indications that other elements could usefully be stated and some words and phrases improved. Therefore, it was suggested to delete the words "the competent national authorities of", replace the word "concerned" by the word "involved" and add a new sentence containing general principles, including such principles as "confidentiality, impartiality and objectivity".

32. The working group decided to put the words "the competent national authorities" in square brackets, to retain the rest of the text as it stood and to add the following new sentence: "The Subcommittee shall be guided by principles of confidentiality and impartiality".

Article 4

33. At the 3rd, 7th and 11th meetings, on 26 and 28 October and 1 November 1993, article 4 was considered by the working group. Concerning paragraph 1, the working group agreed that the number of members of the envisaged body to be established according to the optional protocol should be decided upon at a later stage. The minimum number of members proposed by some delegates was 10. Other participants, however, found the initially proposed number of 25 not excessive, especially considering the clarifications given by its representative on the experience of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

34. The working group agreed to change the wording of the paragraph in such a way as to allow for an increase in membership at a later stage but at the same time not require the number of members to equal that of the States parties. To that effect, the wording of the second sentence of paragraph 1 was changed to read as follows: "After the [number to be inserted] accession to the present Protocol, the number of members of the Subcommittee shall increase to [number to be inserted]".

35. With regard to paragraph 2, the working group agreed that the qualifications for membership established in the paragraph were too limiting. A number of delegates considered it useful, in view of the wide range of expertise required to successfully fulfil the mandate of the body, to include the possibility to nominate and elect members having experience in the administration of justice and in a wider field of human rights than that limited to their international protection. To this effect, the working group

agreed to insert before the word "prison" the words "the administration of justice, in particular in criminal law,". The working group also agreed to delete the words "the international protection of".

36. Concerning paragraphs 3 and 4, the working group decided to retain them in their present form. Some delegations were in favour of a provision stipulating that members of the Committee against Torture and members of the Subcommittee should not be of the same nationality.

Article 5

37. At its 12th, 14th, 16th and 17th meetings, on 1, 2, 3 and 4 November 1993, after having considered paragraphs 1, 2, 3 and 4 of article 5, the working group decided to consider a new text of article 5 drawn up on the basis of article 17 of the Convention against Torture. This new text, as considered at the working group's 17th meeting, on 4 November 1993, was composed of the following five paragraphs.

38. With respect to paragraph 1, the working group agreed on the text contained in the annex.

39. With respect to subparagraph (a), there was consensus that the number of candidates to be nominated should not be mandatory. One delegation indicated that each State party might nominate one person. Some delegations proposed the insertion of a provision that allowed for the nomination of non-nationals, which would help smaller States to nominate appropriate candidates. Some specified that that possibility should be limited to one person, whereas other delegations were in favour of confining all nominations to the nationality of the nominating State party.

40. With respect to subparagraphs (b) and (c), it was decided to reflect the different views of the delegations by inserting square brackets where appropriate. Several delegations were in favour of States parties to the protocol directly electing members of the envisaged body. They considered that there was no legal ground to extend the mandate of the Committee against Torture and that there was a distinction between prevention and monitoring. In the opinion of some delegations, the Committee against Torture had no power to elect but only to nominate.

41. Other participants proposed that members of the Subcommittee be elected by the Committee against Torture. Some delegations and one representative of a non-governmental organization were of the opinion that such a procedure would guarantee the implementation of paragraph 2 of article 4 of the protocol, as well as depoliticize the election and the essential attributes of impartiality, independence and objectivity. It could also facilitate cooperation between the Committee against Torture and the Subcommittee. One delegation indicated that it was legally possible under the protocol to give new functions to the Committee against Torture. He referred to the precedent established by the Optional Protocol to the International Covenant on Civil and Political Rights which gave such new functions to the Human Rights Committee. One delegation stipulated that a member of the Committee against

Torture should only participate in the election of the members of the Subcommittee if the State of which he/she was a national had adhered to the optional protocol.

42. Some delegations proposed that the Subcommittee's members should be elected by the States parties from a list of candidates prepared by the Committee against Torture. Concerning the preparation of such a list, some participants indicated the need to take into account the qualifications and requirements contained in paragraphs 2 and 4 of article 4 of the protocol. Some delegations expressed the view that States should be required to select from the list of candidates proposed for election, whereas others considered that States should be able to choose from the candidates proposed by the Committee against Torture and those proposed by Governments.

43. Some delegations asked for clarification of the possible voting procedures (i.e., secret ballot, roll-call, etc.). With respect to subparagraph (c), one delegation suggested to insert after the word "ballot" the words "taking due account of the principle of equitable geographical distribution". This proposal was supported by another delegation.

44. Referring to articles 17 (3) and (4) of the Convention against Torture, the working group agreed on the texts for paragraphs 2 and 3 respectively (see Annex).

45. The working group agreed on the text for paragraph 4 (see Annex).

46. During the debate on the issue, the representative of the Committee against Torture suggested that reference be made to article 4 of the draft protocol and in particular to paragraphs 2 and 4. Many delegations supported the proposal. In that regard, one delegation proposed to insert after the word "Subcommittee" the words "eligible for election in accordance with article 4".

47. Furthermore, some delegations emphasized the need for a proper representation of women and suggested to insert provisions to that effect. Some participants supported this approach which they considered to be in conformity with the Vienna Declaration and its provision on the participation of women in United Nations organs. Other delegations underlined that any reference to such representation should not prejudice the principle of equitable geographical distribution and the qualifications and requirements for membership of the Subcommittee. Some delegations argued, on the basis of the principle of non-discrimination, against any reference to sex. The working group agreed on a compromise text, inserting after the word "men" the words "on the basis of the principles of equality and non-discrimination.".

48. In addition, some delegations stressed the importance of equitable geographical distribution and suggested that reference be made to this general principle in an additional paragraph. Other delegations questioned the appropriateness of such a reference. They argued that this could give the impression that a special status was given to this principle in relation to the other criteria established in the paragraph.

49. Referring to article 17 (6) of the Convention against Torture, the working group agreed on the text for paragraph 5 (see Annex).

Article 6

50. Referring to article 17 (5) of the Convention against Torture, the working group agreed on the text (see Annex).

51. During the debate on this matter, some delegations considered that a limit on re-election to one additional term was more suitable and conducive to renewal and dynamism of the body. Other participants supported two re-elections in order to ensure continuity. This would take into account the experience of the European Committee on the Prevention of Torture ... It was decided to leave both options open.

52. The working group decided to delete paragraph 2 of article 6 as its content was already reflected in paragraph 4 of article 5.

Article 7

53. Article 7 was considered at the 8th, 9th and 11th meetings, on 28 and 29 October and 1 November 1993.

54. The working group decided, after extensive debate, to redraft this article on the basis of article 18 of the Convention against Torture and additionally proposed texts by the delegations. The working group agreed on the text (see Annex).

55. Concerning paragraph 1, there was consensus that the new wording of this paragraph should follow paragraph 1 of article 18 of the Convention against Torture. One delegation suggested to add the word "once" at the end of the second sentence of this paragraph.

56. With regard to paragraph 3, there was consensus that the wording of the paragraph should follow that of paragraph 4 of article 18 of the Convention against Torture. Some delegations felt, however, that a minimum number of regular sessions per year should be stated in order to guarantee sufficient funding. To meet that purpose it was agreed to add the following wording at the end of the second sentence: ", but it shall meet for a regular session at least twice a year".

57. As to paragraph 4, there was consensus that the wording should follow that of paragraph 3 of article 18 of the Convention against Torture. One delegation felt, however, that the reference to the Committee against Torture should be deleted. The working group decided to put the reference in square brackets.

58. Due to lack of time to fully consider articles 8, 9 and 10 these could not be finalized during the beginning of the first reading. The working group, in view of the heavy and important tasks to be performed at the session, decided to submit the following views, expressed during the general debate, to the Commission on Human Rights for information.

Article 8

59. The working group considered article 8 at its 9th and 17th meetings, on 29 October and 4 November 1993. As to paragraph 1, many delegations felt that the words "regular missions", needed further clarification. Some delegations were in favour of replacing the word "regular" by the word "periodic", hereby avoiding any inappropriate implication for the possibility of irregular missions. One delegation suggested to delete the word "regular" so as to leave the word "mission" unqualified. This would leave the decision to undertake a mission to the sole discretion of the Subcommittee.

60. Some delegations, referring to the European Convention for the Prevention of Torture, were in favour of replacing the word "missions" by the word "visits". Most delegations, however, were in favour of maintaining the distinction between the two notions. In this connection, it was pointed out that it was an established practice of the European Committee for the Prevention of Torture to refer to the notion "mission" in case of a Committee delegation entering a State territory and to refer to the notion "visit" in case of such delegation visiting any one place of detention.

61. Some participants were in favour of deleting the words "each of" in paragraph 1. This would eliminate any confusion as to an existing obligation on the part of the treaty body to visit countries for the reason of their accession to the protocol, rather than for the perceived need for such a mission. At the same time, such a deletion would not impair in any way the existing obligation on the part of States parties to the protocol to receive such missions. They were of the opinion that the deletion would also be in line with the requirement spelled out in General Assembly resolution 41/120 on setting international standards in the field of human rights by which the General Assembly urged Member States and United Nations bodies engaged in developing new international human rights standards to give due consideration in their work to the established international legal framework. By deleting the words "each of", the effective functioning of the already established European Committee for the Prevention of Torture would be adequately taken into consideration.

62. However, one delegation considered the deletion of the words "each of" to be an undue interference with the existing obligation of all contracting parties to receive missions. A number of delegations supported this point of view, adding that, as a matter of principle, all States parties should receive missions. One delegation suggested to replace the words "each of the States Parties" with the words "each contracting party to the present protocol".

63. Few delegations suggested the insertion of a provision requiring the explicit prior consent of States parties to each separate mission. There was, however, a prevailing opinion that such consent was implied with the ratification of the protocol. Many participants felt that the inclusion of such a provision would run counter to the very purpose of the protocol, as they considered the requirement of random access to be vital. One delegate felt that the issue was dealt with in article 12 of the protocol and should therefore not be addressed in the context of article 8.

64. A number of delegations were in favour of inserting a provision allowing for non-regular and ad hoc missions. Certain delegations were of the opinion that there should be no other type of missions than regular ones, taking into account the main object of the protocol. As to the modality of organization of missions, there was a prevailing opinion that that should be left to the discretion of the body.

65. Some delegations felt the need to specify the circumstances that could give rise to such other missions as were referred to in the paragraph. To that effect, one delegation suggested changing the wording of the second sentence of paragraph 1 as follows: "Apart from such missions, it shall also undertake other missions, if it decides that there are well-founded reasons for considering information on non-compliance with the obligations under the Convention by a State concerned.".

66. Other delegations, however, noted that the judgement of those circumstances should be left to the discretion of the envisaged body. Also, some delegations noted that if such qualifications were to be included, they should in no way be exhaustive.

67. One delegation favoured adding the following sentence to paragraph 1: "A delegation appointed by the Subcommittee shall carry out such missions on behalf of the Subcommittee.".

68. With regard to paragraph 2, one delegation favoured the deletion of the word "any". Some delegations were of the opinion that as much discretionary power as possible should be left to the envisaged body regarding the decision to postpone missions. To that effect, a number of delegations favoured adding to this paragraph the following words: "or if the Subcommittee decides that there are other circumstances justifying postponement.". In addition, one delegate suggested adding, after the previous addition, the words "including circumstances arising under article 13.".

Article 9

69. The working group considered article 9 at its 17th meeting, on 3 November 1993. The need for appropriate measures of coordination, to avoid duplication with other bodies, including regional bodies and the International Committee of the Red Cross, and to enhance complementarity was considered as a vital requirement of the optional protocol. It was felt that the protocol's provisions should be universal in scope and not exclude any region, even where relevant regional agreements exist.

70. In the view of one delegation, the system of visits not only reinforced the purposes of the Convention against Torture but also served to support possible efforts in other normative frameworks. Thus, article 9 of the draft highlights the flexibility of the proposed instrument and establishes the principles or bases of coordination and cooperation with other regional systems, such as the European one. Another delegation stated that the relationship the proposed group would have with the mandate of other bodies, such as the Committee against Torture, regional bodies and the Special Rapporteur of the Commission on Human Rights on the question of torture, must be made clear. The draft text, as currently worded, could lead

to overlapping with existing terms of reference, in particular those of the bodies mentioned. The need was also seen for a revision of the conditions for the establishment of cooperation with regional organizations, particularly with regional agreements, on this topic.

71. As to paragraph 1, the working group took note of the reservations expressed by the European Committee for the Prevention of Torture in document E/CN.4/1993/WG.11/WP.1, paragraphs 54-56, about the proposed system of "observers", as found in the text, and its operation. It also took note of Mr. Kellberg's and Mr. Sorensen's statements at the second session, in particular bearing in mind that the European Committee on the Prevention of Torture operates with the aim of identifying situations which could lead to ill-treatment and setting up rules to avoid or remedy such situations.

72. It was suggested arrangements be contemplated between the regional and international systems that would provide an appropriate degree of coordination without prejudicing their characteristics, requirements and fields of operation.

73. It was proposed that a possible solution to the concern expressed above might be found in the principle of reciprocal cooperation between the bodies. One delegate suggested that the comparative effectiveness of the universal and the regional bodies should be a factor in assessing this interrelationship. However, it was pointed out that under the optional protocol a decision about possible visits should be at the discretion of the Subcommittee. A number of specific suggestions relating to the organizational and institutional nature of the body were made to achieve these aims which were consistent with the essential prerequisite of confidentiality of both the regional systems and the optional protocol. In that regard, it was stated that a possible solution of problems of cooperation and avoiding duplication could be for a State which has ratified both a regional system and the optional protocol to agree that visit reports drawn up by a regional body in respect of that country and the State's response were to be systematically forwarded to the Subcommittee on a confidential basis.

74. Taking into account those considerations, one delegation suggested the following new wording of paragraph 1 of this article:

> "If, on the basis of a regional convention, a system of visits to places of detention similar to the one of the present Protocol is in force for a State Party, the Subcommittee shall consult with organs established under such a regional convention with a view to coordinating activities.
>
> "If a State Party submits to the Subcommittee reports and observations it receives from the regional organ regarding missions to its territory, the Subcommittee may decide to exempt a State Party from its programme of regular missions."

75. One delegation proposed to add at the end of the first sentence the following words: "and to avoiding unnecessary duplication". Another delegation, supported by some other delegations, suggested to replace in the second sentence the word "exempt" by the word "refrain".

76. With respect to paragraph 2 of the article, the representative of the ICRC, at the request of one delegation, reviewed the relationship between the activities of Protecting Powers and the ICRC on the basis of the Geneva Conventions of 1949 and the Additional Protocols of 1977, on the one hand, and the visits of the body envisaged by the optional protocol, on the other. In his view, these two systems, having different objectives, should not interfere with each other. That could be achieved on the condition that specificities of their respective mandates were respected.

77. Some participants emphasized the need to avoid overlap in the respective and separable fields of endeavour of the ICRC and the Subcommittee and for the latter to benefit from the experience of the ICRC. One speaker considered that the provision should state more clearly that the mandate of the Subcommittee would not overlap with the role of the ICRC under the above-mentioned treaties. It was also emphasized that it was necessary for the possible solution to identify mechanisms for consultations, so as to fulfil their respective responsibilities. One delegation proposed to replace paragraph 2 of the article by the wording of paragraph 2 of article 16 of the Convention against Torture, which would read as follows: "The provisions of this Protocol are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment.".

Article 10

78. The working group considered article 10 at its 9th and 11th meetings, on 29 October and 1 November 1993. With respect to paragraph 1, some delegations stated that the need for experts to assist the mission was not clearly established. In this regard they also noted that members of the Subcommittee themselves were to be experts in relevant fields. They felt there was a need to clarify the way in which they would be selected. Some delegations suggested to delete the reference to experts in the paragraph. One delegation proposed the following text to that effect: "The mission shall consist of at least two members of the Subcommittee. The visits shall be carried out by them and can be assisted by interpreters if necessary.".

79. Other speakers, however, argued that the presence of experts was necessary because of the work-load to be carried and the flexibility required. Those delegates referred to the specificity of the professional expertise required not only for the work of the Subcommittee, but more importantly for the successful completion of the missions to be undertaken by that body. Those missions have, in the experience of the European Committee for the Prevention of Torture, proven to be of a very diverse character, which in itself justified the provision made in the article for the possible inclusion of experts in missions to be undertaken by the envisaged body. These delegations, moreover, considered that the exclusion of experts would necessarily imply an increase in the number of the Subcommittee members. Some delegations suggested the addition of the following paragraph:

> "During its interviews with persons deprived of their liberty a delegation shall, if possible, use only one language. This language may be different from the language of the persons interviewed, in which case it shall communicate through interpreters.".

80. One delegation suggested to insert after the words "carried out by" the words "a delegation of the Subcommittee consisting of". Some delegations proposed to add the following phrase as a third paragraph:

> "The Subcommittee will ensure that the delegations, experts and interpreters visiting a State Party include an appropriate number of women to facilitate the receipt of information concerning the treatment of women detainees."

## III. FUTURE WORK

81. At its 18th meeting, on 5 November 1993, the working group agreed to the Chairman's proposals as to the form and content of the present report; it then discussed how the progress achieved to date could best be continued. There was general agreement that useful progress had indeed been made at the second session and that a continuation of the work in the same way offered a prospect of the final elaboration, within a reasonable period, of a text which could be of great value in the field of the prevention of torture. The working group considered that, if it was authorized to meet for a further session of two weeks, at some point before the next session of the Commission, and were then mandated to pursue its work on the same basis as before, it could be expected that it would achieve further progress in the elaboration of the instrument under its consideration within an acceptable time-frame. It would be helpful if the secretariat could prepare for the assistance of the working group, at that further session, a working paper covering the articles that remained to be discussed and taking account of the comments and suggestions made by Governments, specialized agencies and non-governmental organizations, including those submitted during the session of the working group.

## VI. ADOPTION OF THE REPORT

82. The report was adopted at the 20th meeting of the working group, on ... 1994.

ANNEX

TEXT OF THE ARTICLES WHICH CONSTITUTE THE OUTCOME OF THE BEGINNING OF THE FIRST READING

ARTICLE 1

1. A State Party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held [provided that full respect is assured for the principles of non-intervention and the sovereignty of States]. 1/

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from [, and [to take] measures for the prevention of] torture and from other cruel, inhuman or degrading treatment or punishment in accordance with applicable international [standards], [instruments], [law].

ARTICLE 2

There shall be established a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [of the Committee against Torture] [which shall carry out the functions laid down in the present protocol] (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

ARTICLE 3

In the application of this Protocol, the Subcommittee and [the competent national authorities of] the State Party concerned shall cooperate with each other. The Subcommittee shall be guided by principles of confidentiality and impartiality.

ARTICLE 4

1. The Subcommittee shall consist of [number to be inserted] members. After the [number to be inserted] accession to the present Protocol, the number of members of the Subcommittee shall increase to [number to be inserted].

2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of

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1/ Several delegations did not agree with certain aspects of the text of paragraph 1 of article 1. They believed that each visit should have the consent of the State party concerned. Several delegations also suggested that the words "any place in" should be deleted. One delegation had concerns in regard to the wording of the present draft of paragraph 1 of article 1 and reserved the right to revert to it in the light of future agreement on the remaining articles. These concerns did not refer to the words "any place in".

the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Subcommittee may be nationals of the same State.

4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

ARTICLE 5

1. The members of the Subcommittee shall be elected in the following manner:

(a) Each State Party may nominate up to three persons possessing the qualifications and meeting the requirements set out in article 4 [one of whom may be a national of a State Party other than the nominating State Party];

[(b) From the nominations received the Committee against Torture shall prepare a list of recommended candidates, taking due account of article 4 of the present Protocol. This list shall consist of not less than twice the number of members of the Subcommittee to be elected and not more than two and a half times the number of members to be elected;]

(c) The members of the Subcommittee shall be elected by [the States Parties] [the Committee against Torture] by secret ballot [from the list of recommended candidates prepared by the Committee against Torture].

2. Elections of the members of the Subcommittee shall be held at biennial meetings of State Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than [to be determined] after the date of the entry into force of the present Protocol. At least four months before the date of the meeting of the Committee against Torture which precedes the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them [and shall submit it to the Chairman of the Committee against Torture]. [The Chairman of the Committee against Torture shall submit to the Secretary-General the list of recommended candidates prepared in accordance with paragraph 1 (b) of this article.] [The Secretary-General shall submit this list of recommended candidates to the States Parties.]

4. In the election of the members of the Subcommittee, eligible for election in accordance with article 4, consideration shall be given to equitable geographical distribution of membership, to a proper balance among

the various fields of competence referred to in article 4 and to the representation of different forms of civilization and of the principal legal systems.

Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

5. If a member of the Subcommittee dies or resigns or for any other cause can no longer perform the member's Subcommittee duties, [the Committee against Torture shall, after having consulted the State Party of which the member was a national,] [the State Party which nominated the member shall] appoint another person of the same nationality possessing the qualifications and meeting the requirements set out in article 4 to serve for the remainder of the member's term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

ARTICLE 6

The members of the Subcommittee shall be elected for a term of four years. They shall be eligible for re-election [once] [twice] if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 5, paragraph 2.

ARTICLE 7

1. The Subcommittee shall elect its officers for a term of two years. They may be re-elected [once].

2. The Subcommittee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Half plus one members shall constitute a quorum;

(b) Decisions of the Subcommittee shall be made by a majority vote of the members present;

(c) The Subcommittee shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure [, but it shall meet for a regular session at least twice a year.]

4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of [the Committee against Torture and] the Subcommittee under this Protocol.

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